IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02/11/2004

CORAM

THE HON'BLE MR.JUSTICE K.RAVIRAJA PANDIAN

W.P.No.26760 of 2004
and
W.P.No.26761 of 2004
and
W.P.M.P.No.34224 of 2004
and
W.P.M.P.No.34225 of 2004

M/s.Shasun Drugs & Chemicals
Shasun Road, Periakalapet
Pondicherry - 605 104
rep.by the General Manager
(Commercial), C.Bhaskara Rao ... petitioner in both W.Ps

-Vs-

1. Customs, Excise and Service
Tax Appellate Tribunal
SZB, Shastri Bhavan
Annexe, First Floor
No.26, Haddows Road
Chennai - 600 006
2. The Commissioner of Customs
No.60, Rajaji Salai
Chennai - 600 006
3. The Deputy Commissioner of
Customs, No.60, Rajaji Salai
Chennai - 600 001. ... Respondents in both W.Ps

Prayer: Writ Petitions filed under Article 226 of the
Constitution of India for the relief of issuance of writ of certiorari as
stated therein.

For petitioner :Mr.Habibulla Basha,
Sr.Counsel for
M/s.S.Dayaleeswaran
For Respondents:Mr.V.T.Gopalan,
Addl.Solicitor General for
Mr.R.Thirugnanam,SCGSC

:ORDER
The writ petition in W.P.No.26760 of 2004 is filed seeking the relief

of issuance of writ of certiorari to call for the records of the third respondent, Deputy Commissioner of Customs, Chennai in detention notice F.NO.S.59/ DEEC/485/95 Gr.7(PT) dated 2.9.2004 and quash the same.

2. The writ petition in W.P.No.26761 of 2004 is filed seeking the relief of issuance of writ of certiorari to call for the records of the first respondent, Customs, Excise and Service Tax Appellate Tribunal, (hereinafter referred to as "CESTAT") in fi nal order No.414 of 2004 dated 28.4.2004 and quash the same.

3. As the detention notice dated 2.9.2004 impugned in W.P.No.36760 of 2004 is consequential to the order impugned in W.P.No.26761 of 2004 , both the writ petitions are taken together for consideration.

4. The material facts go as follows:

The petitioner is a Company engaged in the manufacture of bulk drugs in its factory at Pondicherry and Cuddalore. For the purpose of manufacturing drugs, the petitioner imports raw material. The notification No.203/92 dated 19.5.1992 issued under sectio n 25(1) of Customs Act exempted whole of the duty payable on the inputs imported into India against a Value Based Advance Licence (hereinafter referred to as "VABAL"), provided the export obligation is discharged by exporting goods manufactured in India in respect of which no input stage credit was obtained under Rules 5 6A or 57A of the Central Excise Rules, 1944. During the period between June, 1993 to March, 1995, the petitioner imported input under various VABALs and availed exemption under the said notification. The petitioner had taken MODVAT credit under Rule 57A of the Central Excise Rules on the indigenous inputs which were also used for the manufacture of end product and cleared for home consumption on payment of Central Excise duty. After c arrying out the export, the MODVAT credit taken in respect of inputs used in the manufacture of drug were reversed on actual use basis.

5. The second respondent, the Commissioner of Customs, Chennai issued a show cause notice on 24.7.1995 in respect of 9 VABALs under which import were made by the petitioner alleging that the petitioner had violated condition No.V(a) of notification No.2 03/92 and called upon the petitioner to show cause as to why the duty in a sum of Rs.8,46,13,967/- should not be imposed under proviso to section 28(1) of the Customs Act, 1962 and as to why the interest and penalty should not be imposed. On 25.9.1995, another show cause notice was issued on the same lines in respect of 5 VABALs demanding duty of Rs.4,46,07,079/ among other things such as interest and penalty. The petitioner on 27.9.1995 replied to the show cause notice dated 24.7.1995 denying its l iability on various points. In respect of the second show cause notice dated 25.9.1995, the petitioner submitted a reply dated 31.10.1995 in almost on the same lines as that of the earlier reply dated 27.9.1995.

6. While that being so, on 3.1.1997 the Government announced an Amnesty Scheme (hereinafter referred to as "Scheme"). In the Scheme, condition No.V(a) of Notification No.203/92 was relaxed expost facto by providing the amnesty on the reversal of the MO DVAT credit incorrectly

availed on the goods exported together with interest at the rate of 20 percent on the said amount of MODVAT credit retained between the date of export and the date of reversal on or before 31.1.1997. The Scheme was followed by a Circular dated 10.1.1997 laying down the formula for quantification of MODVAT credit to be reversed and other modalities such as the head of account in which the reversal had to be made, the format for such reversal, the certificate to be issued by the Assistant Commissioner of Central Excise for proof of such reversal.
7. The petitioner reversed the MODVAT credit for Rs.75,21,586/- on 2 6.9.1995. Subsequently, two reversals have been made for Rs.3,41,939/- and Rs.1,23,303/- on 29.2.1996. A reversal had also been made for Rs.18,27,721/- towards interest on 29.1.1997 as contemplated in the scheme.

8. On the petitioner further reversing credit for a sum of Rs.1,49,2 66/- as directed, the Assistant Commissioner of Central Excise, Pondicherry issued a certificate dated 13.2.1997 to the effect that the petitioner reversed total MODVAT credit of RS.81, 46,490/- in respect of clearance of input (Ibuprofen) under VABAL from August, 1993 to 19.3.1995 and also debited an amount of Rs.19,22,3 71/- as interest on the above credit. Out of the amount of Rs.19,23,3 71/-, Rs.18,27,721/- was reversed on 31.1.1997 and the balance on 6.2.1997.

9. After further verification, on 3.9.1997, the Assistant Commissioner of Central Excise, Pondicherry issued certificate in terms of Scheme and the circular, certifying that the petitioner has reversed the MODVAT credit of Rs.83,01,114/- and interest of Rs.20,80,304/-.

10. Subsequently, on 15.9.1997, the Superintendent of Central Excise, Pondicherry informed the petitioner that the reversal interest in RG23A Part II account was not in conformity with the circular dated 10 .1.1997 and directed the petitioner to remit th e interest by cash. The said direction was complied with by the petitioner on 16.10.1997 by making cash payment of Rs.20,85,305/-. Again, on 29.10.1997, the Assistant Commissioner, Central Excise, Pondicherry issued a revised certificate to the effect th at the petitioner reversed MODVAT credit of Rs.83,01,114/- and interest of Rs.20,80,305/- in their RG 23A Part II account in respect of the export made under the VABAL scheme.

11. On production of the certificate, the second respondent passed an order on 17.4.1998 in favour of the petitioner by holding that the customs duty as demanded in the show cause notice was not recoverable from the petitioner and consequential propose d penal action was unwarranted and ordered the proceedings to be withdrawn against the petitioner on the ground that the petitioner has substantially complied with the Scheme. The Board having found that the said Order was not in accordance with law an d the scheme, directed the Commissioner to carry the matter on appeal to the the first respondent.

12. On the appeal so carried, the first respondent, Tribunal by its order dated 28.4.2004 reversed the order of the Commissioner by holding that the petitioner was liable to pay the duty of customs as demanded in the show

cause notice as part of the d uty and interest were paid beyond 31.1.1997. However, in respect of interest and penalty, the relief granted by the Commissioner had been confirmed.

13. Thereupon, the petitioner carried the matter on statutory appeal to the Supreme Court under Section 130-E of the Customs Act, however withdrew the same on the ground that the petitioner would file an application for rectification of mistake (hereina fter referred to as "R.O.M") before the first respondent and as such such an application has been filed along with a stay application. As no orders were passed by the Tribunal in the application and in the mean while coercive steps were taken against th e petitioner for recovery of the amount and detention order was also issued against the petitioner, the petitioner filed the present two writ petitions with the prayer as stated above.

14. The writ petitions were admitted on 21.9.2004 and an interim order of status quo has been granted, which was subsequently extended by order dated 1.10.2004.

15. The respondents filed counter affidavit raising objection as to the maintainability of the writ petitions and on merits it was contended that the petitioner having failed to comply with the conditions of the Amnesty scheme, is not entitled to any b enefit.

16. Mr.V.T.Gopalan, learned Additional Solicitor General raised a preliminary objection as to the maintainability of these writ petitions and also on merits after completion of the argument of Mr.Habibulla Basha, learned Senior Counsel for the petitione r argued for dismissal of the writ petitions. The contentions are as follows:

"1. The Order of the first respondent - CESTAT had merged with the order of the Supreme Court in the civil appeal. The writ petition under Article 226 cannot be maintained which otherwise amount to an appeal over the judgment of the Supreme Court.

2. The petitioner was allowed to withdraw the Civil Appeal by the Supreme Court on a request made by the petitioner to go before the first respondent by filing an application for rectification of mistake. The petitioner having filed such an application before the first respondent, ought not have withdrawn the same and filed a writ petition under Article 226.

3. As against the order of the first respondent, a statutory appeal is provided before the Division Bench of the High court under Section 130(7) of the Customs Act. Departing from that statutory provision, a writ petition under Article 226 is not mainta inable.

4. On merits, though a substantial portion of the MODVAT credit had been reversed prior to 31.1.1997, interest had been paid in cash only after the cut-off date. The Scheme has to be strictly construed. As the petitioner failed to comply with the condit ions within the cut off date, they are not entitled to the benefit.

5. The Scheme had been issued with reference to the VABAL license holder only and not with reference to VABAL licence. Hence, the compliance or contravention of each of the licence need not be gone into and as such the order of the first respondent - Tr ibunal cannot be found fault.

17. Mr.Habibulla Basha, learned Senior Counsel appearing for the petitioner contended as follows:
1. The order of the Supreme Court is an order of withdrawal simplicitor, though the reason for such withdrawal has been stated. The order of withdrawal cannot be treated as an order on merits so as to contend merger.
2. The jurisdiction under Article 226 cannot be compared with any other statutory provisions. The existence of the statutory remedy in a given circumstances cannot debar rather dis-entitle the petitioner from invoking the jurisdiction under Article 226 of the Constitution of India.

3. An order ex facie illegal or with mistakes apparent on the face of the record can very well be questioned under Article 226.
4. The petitioner reversed major portion of the MODVAT credit together with interest as provided in the Scheme dated 3.1.1997 prior to the cut-off date, and such reversal has been accepted by the Assistant Commissioner, Central Excise Department. The su bsequent direction by the Superintendent, Central Excise Department to make the payment of interest in cash is not in accordance with the Scheme.

5. The petitioner, in reply to the show cause notice, raised several contentions, including plea of limitation. The compliance or default of each licence has to be considered independently. The first respondent having found that the petitioner was not e ntitled to the benefits of Scheme ought to have remanded back the matter to the original authority for reconsideration of the issues on merits. But in a casual manner, rejected the contention of the petitioner with an observation that the bald statement of pro rata adjustment could not be granted and foreclosed the issue by itself.

6. The first respondent ought to have atleast by taking the role of the original authority, considered the objections raised by the petitioner to the show cause notice on its own merits.
7. Such an ex facie illegal order which contains mistakes apparent on the face of it has to be set aside.

18. I heard the argument of the learned counsel on either side and perused the material on record and also the case laws cited before this Court.

I. Contention of maintainability of writ petition:
19. To bring home the objection as to the maintainability of the writ petition, learned Additional Solicitor General relied on the Apex Court decision in KUNHAYAMMED AND OTHERS VS. STATE OF KERALA reported in (2000)6 SCC 359. He emphasized paragraph N o.22 of the said judgment to contend that though a civil appeal is dismissed by a non-speaking order, it would tantamount to a merger of the order of the first respondent with that of the Supreme Court.

20. In that case, the Supreme Court considered the doctrine of merger with reference to the orders passed by the Supreme Court at various stages of S.L.P. such as post-leave stage, dismissal at the stage of special leave without reason, dismissal of S.L .P. by speaking order, dismissal of appeals after leave being granted by a speaking order or without furnishing any reason. In that judgment, the situation of the present nature has not been considered, apparently because that a civil appeal dismissed as withdrawn would otherwise amount to relegating the parties to the position prior to the filing of the appeal and by such an order, the order appealed against was

neither set aside nor modified nor confirmed nor even not taken up for consideration. The only probable hurdle would be that, the order cannot be normally allowed to be re-agitated before the Supreme Court.

21. In that case, the Apex Court made the exposition of law on the concept of merger. It would be beneficial to extract the exposition with the words of the Supreme Court itself, which reads as follows:
"The doctrine of merger is neither a doctrine of constitutional law nor a doctrine statutorily recognised. It is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system. ....
The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subjectmatter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjec ted to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before i t either way - whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the dec ree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject matter of challenge laid or which could have been laid shall have to be kept in view."
22. The reliance of paragraph No.22 of the above Rule by the learned Additional Solicitor General cannot further his point of merger. In that paragraph, while concurring with the earlier decision rendered by the two judges Bench of the Apex Court in V.M .SALGOACAR AND BROTHERS PRIVATE LIMITED VS. C.I.T. (2000(5) SCC 373), the Supreme Court has observed that when a special leave petition was dismissed, the Court did not comment on the correctness or otherwise of the order from which leave to appeal is s ought. What the Court meant was that it did not consider it to be a fit case for exercising its jurisdiction under Article 136 of the Constitution. That certainly could not be so when the appeal is dismissed, though by a non-speaking order. The last of the above observation was very much relied on by the learned Additional Solicitor General to buttress his case. I am of the view that that sentence has to be considered in conjunction with the earlier sentence and not in isolation. From the exposition of law made by the Supreme Court in the above judgment, it is clear that the order allowing the petitioner to withdraw the appeal cannot be compared to an order passed by the

Supreme Court either modifying or confirming or setting aside the order of the fi rst respondent so as to plead merger.

23. Learned Additional Solicitor General contended that on the order of dismissing the civil appeal as withdrawn, the petitioner was entitled only to file a R.O.M. before the first respondent. This contention, I am of the view, goes against the stand of merger taken by the learned Additional Solicitor General, in the absence of such direction given by the Supreme Court. When the petitioner was entitled to file R.O.M. on the civil appeal being dismissed as withdrawn, the question of merger does not ari se at all. When the remedy of R.O.M. is available, the other remedies are equally available to the petitioner. The order of Supreme Court cannot be regarded differently one as not merged for the purpose of filing R.O.M. and other as merged for seeking ot her remedies.

24. Learned Additional Solicitor General relied on a decision of the Supreme Court in the case of STATE OF MAHARASHTRA VS. ISHWAR PIRAJI KALPATRI AND OTHERS reported in (1996) 1 SCC 542 to contend that the practice of the petitioner filing a statutory appeal and withdrew the same and thereupon filing a writ petition has to be deprecated and for that purpose, he relied on paragraph No.9 at page 547 of the Rule. That was a case in which an Officer of the police department against whom certain charges h ave been leveled under the Prevention of Corruption Act and when the matter was pending before the Special court, filed criminal writ petition under Section 482 of Cr.P.C. read with Article 227 of the Constitution of India on the ground of infirmity in t he grant of leave to prosecute and got the charges quashed. On appeal before the Supreme Court, having felt that he might not get a favourable order before the Supreme Court, sought to withdraw the writ petition in which he obtained a favourable order, t o agitate the very same grounds before the Special Court. In that context of the case, in paragraph NO.9 of the said judgment, it was held thus:
"A party to the proceedings cannot be allowed at this stage at least to take a chance and if he gets the impression that he will not succeed to seek permission to withdraw the original proceeding obviously with a view to re-agitate the same contentions, which have been or may be adjudicated upon by a higher court before the subordinate court though in different proceedings."

The facts of the present case are not even comparable with the cited case, rather in the present case, the Supreme Court itself granted the prayer for withdrawal of the appeal.

25. The second and third contentions raised can be decided together. It is the case of the petitioner that the petitioner in fact filed R.O.M. before the first respondent along with a stay application. The R.O.M. application has not been taken up for o rders on the ground that a Senior Departmental representative from Delhi was going to argue the matter and has been adjourned periodically. In the mean time, the petitioner was visited with an order of detention and coercive steps were initiated against it. Such circumstances forced the petitioner to file the present writ petition. That fact was not at all disputed by the respondents.

26. Any order that might be passed in the R.O.M. could very well be put in issue under Article 226 of the Constitution of India. The existence of adequate or suitable alternative remedy available to the petitioner could be regarded as a factor, and coul d be considered while entertaining an application under Article 226 of the Constitution of India, for exercising the jurisdiction to issue writ. But the existence of such remedy would not impinge upon the jurisdiction of the High Court to deal with the m atter itself, if it is in a position to do so on the basis of the averments made in the affidavit filed. Even when an alternative remedy has been availed by a party and not pursued, and rather withdrawn, the party could prosecute proceedings under articl e 226 for the same relief or for rather a larger relief. The petitioner had not suppressed any material, but explained the circumstances in which the petitioner was forced to approach this Court by invoking the jurisdiction under Article 226. Useful ref erence can be had to the judgment of the Supreme Court in the case of S.J.S.BUSINESS ENTERPRISES PRIVATE LIMITED VS. STATE OF BIHAR AND OTHERS reported in (2004) 7 SCC 166. The power vested in the High Court under Article 226 of the Constitution to exerc ise judicial superintendence over the decisions of all Courts and tribunals is part of basic structure of the Constitution. Such an inviolable jurisdiction of the Court cannot be said to be impinged because of availability of alternate remedy. (vide Seve n Judges Judgment of the Supreme Court in L.Chandra Kumar case (1997(3) SCC 261). For the above reasonings, I am of the view that the petitioner cannot be non-suited for invocation of proceedings under Article 226.

II. Contention of merits:

27. On merits, learned Additional Solicitor General heavily relied upon the decision of the Supreme Court in the case of BHARATI TELECOM LIMITED VS. COMMISSIONER OF CUSTOMS (2001 (134) E.L.T. 327 (S.C.)), which has been relied on by the first respondent to deny the benefit to the petitioner. That was a case in which a single VABAL obtained during June, 1993, the export obligation of which was complied with in July, 1993 was considered with reference to two questions raised before it, one as to whether Scheme recognise the MODVAT credit reversed by the exporter prior to coming into force of the Scheme and the other as to whether the interest on the MODVAT credit should also be deposited within 31.1.1997. The Apex Court on construing the Scheme with ref erence to the questions raised, has answered both the questions in affirmative. The Apex Court declined to entertain yet another point to the effect that the exporter was manufacturing goods both for home consumption and also for export and it was not p ossible to segregate inputs utilised in the manufacture of final product which was exported, therefore it was permissible for the exporter to avail MODVAT credit and then to reverse it on the ground that such a plea had not been taken earlier and could n ot be permitted to raise before the Supreme Court. No other point was raised and argued before the Apex Court in that case. In that factual matrix of the case, the Supreme Court having found on fact that the interest on the credit has not been deposited by 31.1.1997 held that the appellant therein was not entitled to the benefit of the scheme. On a reading of the above said

Rule, it seems by mistake the amnesty scheme dated 3.1.1997 was projected as Circular and the subsequent circular dated 10.1.199 7 giving out the formula for quantifying the MODVAT credit and other modalities for reversal of such credit has been projected as Scheme before the Supreme Court, which is evident from paragraph No.4 of the Rule. As number of different and distinguishin g factors are there in the present case, which are being discussed below in this order, the case of Bharati Telecom cannot be regarded as ratio decidendi to the case on hand (See Haryana Financial Corporation case JT 2002(1) SC 482 and Constitution Bench Judgment in the case of Padmeswararao 2002 AIR SCW 1156).

28. On the facts of the present case, the first show cause notice dated 24.7.1995 has been issued with reference to 9 VABALs. The second show cause notice dated 25.9.1995 was issued with reference to 5 VABALs. In the show cause notices details as to ea ch VABALs were mentioned in column 1 of the annexure. The goods imported against each each VABALs under Bills of entry were mentioned in column 2. Likewise, the other particulars such as description of goods imported, value in rupees, rates of duty and duty payable were given in separate column. In respect of the 9 value based advance licences, the total duty payable, at different rates had been quantified to Rs.8,46,13,967/- by giving brake-ups for each licence. Likewise, in the second show cause noti ce dated 25.9.1995, total amount of duty payable had been calculated at Rs.4,46,07,079/- by giving brake-up with reference to each licence.

29. The reply of the petitioner dated 27.9.1995 to the first show cause notice proceeded to the effect that the petitioner had not taken the benefit of MODVAT credit and not contravened clause V(a) of the notification No.203/92. The imported inputs were exempt from customs duty and countervailing duty. The importer used indigenous raw materials by availing MODVAT credit. At the time of receipt of input, they would not be aware of the quantity of local raw material went into the exported products. The M ODVAT credit was taken only on goods cleared for home consumption. As and when the quantum of indigenous inputs used in exported goods was ascertained, the MODVAT credit in respect of those raw materials were reversed. Condition No.V of notification NO.2 03/92 would only apply to inputs covered by a particular licence. In respect of indigenous inputs, there could be no bar in taking MODVAT credit as it was expressly allowed under the MODVAT scheme. A substantial portion of the demand is barred by limita tion as the provision to section 28(1) of the Customs Act, 1962 would not apply. The same was the explanation in respect of the second show cause notice. This aspect of the matter had not been considered by the second respondent, obviously, because he wa s of the view that the petitioner was entitled to the benefit of the scheme dated 3.1.1997. But while reversing the order of the Commissioner, the first respondent failed to consider the other issues raised in the show cause notice as stated above.

30. Yet another crucial factor is also available in this case. The petitioner has reversed not only the MODVAT credit, but also the interest. Such reversal of MODVAT credit and interest has been accepted and the requisite certificate as provided in the circular dated 10.1.1997 was issued by the Assistant Commissioner of Central Excise, Pondicherry on 13.2.1997. In

that certificate, the Assistant Commissioner of Central Excise has informed the Assistant Commissioner of Customs that the petitioner had reversed total MODVAT credit of Rs.81,46,490/-, that the petitioner has also debited a sum of Rs.19,22,371/- as interest on the above credit. Out of the above amount of Rs.19,22,371/-, Rs.18,27,721/- was reversed on 31.1.1997 and the balance on 6.2.1997 . On further verification, yet another certificate dated 3.9.1997 was issued by the Assistant Commissioner of Central Excise, Pondicherry to the effect that the petitioner had reversed MODVAT credit of Rs.83,01,114/- and interest of Rs.20,80,304/-. The details of which have been given in eight serial numbers. As seen from the details, except the reversal of a sum of Rs.1,49,266/- and a sum of Rs.1,54,624/- shown as S.Nos.5 and 6, all other reversals were made prior to the crucial date 31.1.1997. In respect of reversal of interest on MODVAT credit, the particulars given by the Assistant Commissioner of Central Excise in the very same letter reveals that the interest for a sum of Rs.18,27,721/- had been reversed on 31.1.1997 i.e.,on the crucial dat e, but three other amounts for a sum of Rs.8,793/-, Rs.85,857/-, and Rs.1,57,933/- were reversed on 6.2.1997, 6.2.1997 and 19.8.1997 respectively, which are apparently after the cut-off date.

31. The Additional Solicitor General contended that clause (a) of the Scheme alone cannot be taken in isolation of other clauses. Clause (b) of the Scheme contemplates payment of interest which would only mean payment of interest in cash. All the clause s in the Scheme has to be taken together. If that be so, the payment of interest in cash were all made after the cut off date. As per Bharati Telecom case, the petitioner is not entitled to the benefit of the scheme.

32. In order to appreciate the above contention, it would be beneficial to have close look at the Scheme, which runs as follows:

"The Export-Import Policy 1992-97 as well as the corresponding customs exemption Notification No.203/92 Customs permitting duty free import of materials required for export production under the Value Based Advance Licensing Scheme had inter-alia provide d that in respect of the export goods the benefit of input stage credit should not have been availed of by the exporter under Rule 57A of the Central Excise Rules, 1944. However, it was noticed by the Government that a large number of exporters availing benefit under the aforesaid scheme had also availed input stage credit in respect of the goods exported by them. Such exporters had obtained duty free clearances by mis-declaring that they had not availed any input stage credit in respect of such export goods and thus rendered themselves liable to penal action.
2. The Government had comprehensively examined this matter keeping in view the legal and administrative implications as well as repercussions on the export trade if it were to initiate enforcement proceedings against the exporting community for the brea ch of the condition of the Scheme as well as the customs exemption Notification.
3. Enforcement action in terms of law may not only adversely affect export efforts of the country but would also cast a tremendous administrative burden on perusing a large number of adjudication cases. The Government, therefore, deems it expedient to re lax the relevant condition of Customs Notification No.203/92-Cus., ex-post-facto on compliance of following conditions: -

(a) The concerned exporters reverse the MODVAT credit incorrectly availed of by them on the goods exported under the Scheme, together with interest at the rate of 20% on the said amount of MODVAT credit retained by them between the date of export and the date of reversal.
(b) If reversal of MODVAT credit and payment of interest as contemplated in condition (a) is completed by 31.01.1997 and thereupon no demand of Customs duty leviable on goods imported against the Value Based Advance Licence in question shall be paya
(c) The proposed relaxation will, however, not cover such merchantexporters who had not declared the details of their supporting manufacturers and, consequently, in whose cases the reversal of MODVAT is not practicable.
(d) In all cases where MODVAT credit is reversed and the amount of interest is also paid before 31.01.1997, no penal action or prosecution proceedings shall be initiated against the Value Based Advance Licence holder.
(e) The Value Based Advance Licence holders who fail to reverse the MODVAT credit in full before 31st January, 1997 shall not be exempt from penal proceedings under the law."
D/P/F/No.605/140/95- DBK DATED 03.01.1997."

33. It is clear from the above clauses that clause (a) provides for the conditions to be complied with for becoming eligible for the benefit under the Scheme. The conditions to be complied with are that (1) reversal of MODVAT credit incorrectly availed by the exporter and (2) Interest at 20% on the amount of MODVAT credit from the date of export till the date of reversal has to be reversed. The language employed in the clause is that reversal of MODVAT credit together with interest at 20%. This clau se can be regarded as substantive clause. The term "together" has been defined in Black's Law Dictionary (V Edition) as "in union with" - "along with". If the clause (a) is so construed, it would only mean if reversal of MODVAT credit along with interest is made, the exporter is entitled to benefit under the Scheme.

34. The other clauses such as Clause (b), (d) and (e) (Clause (c) is not relevant for our purpose) are all giving out the consequences of compliance of clause (a) and they can be regarded only as subsidiary or subordinate to clause (a). The clause (b) provides that if reversal of MODVAT credit and payment of interest as contemplated in condition (a) is completed by 31.01.1997, the customs duty payable on the goods imported need not be paid. Clause (d) provides that if MODVAT credit is reversed and if the amount of interest is also paid before 31.1.1997, no penal action or prosecution proceedings shall be initiated. Clause (e) provides that if the condition has not been complied with before 31.1.1997, the exporter is liable for penal proceedings.

35. Though the words "payment of interest as contemplated in condition (a)" in clause (b), and "the amount of interest is also paid before 31.1.1997" in clause (d) are used as these clauses provided consequences of compliance or non-compliance of th e clause (a). Those words cannot be read into or imported in clause (a). Clause (b), though used the word "payment of interest", the further wordings "as contemplated in clause (a) makes the issue all the more different. What is contemplated in clause (a) is reversal of

MODVAT credit together with interest. The clauses are to be understood in the context in which or the purpose for which they are incorporated. The purpose of incorporation of clause (b) and (d) are for providing the consequences of compl iance of clause (a).
36. The Circular dated 10.1.1997 which was relied on by the department to come to the conclusion that interest has to be paid in cash is also did not improve the case of the Department as there is no such explanation offered in the circular. At the most in para 3 of Circular it was stated interest has to be deposited, the word "deposited" cannot be construed as giving meaning as "payment in cash". Black's Law Dictionary (V Edition) defines the word " deposit" as follows:
"to commit to custody or to lay down, to place, to put, to let fall (as sediment), to lodge for safekeeping, or as a pledge to entrust to the care of another."

37. It is well established and well recognised principle of interpretation that one should not concentrate too much on one word and pay too little attention to other words. No word in any provision can be construed in isolation. Every word must be looke d at generally and in the context in which it is used and gather the mens or sententia legis of the Legislation. Where the words are clear and there is no obscurity or ambiguity and the intention of Scheme is clearly conveyed, there is no scope for the C ourt to take upon itself the task of amending or altering the provision as the Court is only interpreting the Scheme, but not framing the Scheme. When the language is clear, the intention of Scheme has to be gathered from the language used and while doi ng so, what has been said and what has not been said has to be noted. The subordinate or subsidiary clause would yield to the substantive clause. (vide M/s.GRASIM INDUSTRIES LTD. VS. COLLECTOR OF CUSTOMS, BOMBAY JT 2002(3) SC 551). By adopting the said h itherto uncontroverted legal principle, if the Scheme is construed, the reversal of interest is in accordance with clause (a) of the scheme. Any other construction would amount to tinkering or doing violence to the express language used, particularly, cl ause (a) of the Scheme. It is evident that the

Department also so construed the Scheme and accepted the reversal interest as in accordance with clause (a) of the Scheme from paragraphs 1 and 2 of their letter dated 4.2.1997.

38. The other contention that the compliance of the condition has to be considered in respect of each licence is also merits consideration as in the show cause notices itself the duty payable as against each licence was calculated and given separately. In addition to that, clause (b) of the Scheme is also provided in the same way by stating that if the condition as contemplated in Clause (a) is completed by 31.1.1997 "thereupon no demand of customs duty leviable on goods imported against the value base d advance licence in question shall be payable". The VABAL licences is question or in dispute are 13 licences, which are the subject matter of two show cause notices stated above. Hence this contention is accepted.

39. Therefore, the orders of the respondents are hereby set aside and the matter is send back to the second respondent to consider the issue of

quantifying the duty taking into account the reversal of duty and interest by the petitioner as certified by the competent Assistant Commissioner, Central Excise and proceed further thereupon, by allowing the writ petitions. Accordingly, these writ petitions are disposed of. No costs. Consequently, the connected W.P.M.Ps are closed.

Index :Yes
Website:Yes

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To

1. Customs, excise and Service
Tax Appellate Tribunal
SZB, Shastri Bhavan
Annexe, First Floor
No.26, Haddows Road
Chennai - 600 006

2. The Commissioner of Customs
No.60, Rajaji Salai
Chennai - 600 006

3. The Deputy Commissioner of
Customs, No.60, Rajaji Salai
Chennai - 600 001.